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In the Supreme Court of the United States

OCTOBER TERM, 1961

JOHN C. ABBOTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Claims (Pet App. 1-7) is reported at 287 F. 2d 573.

JURISDICTION

The judgment of the Court of Claims was entered on March 1, 1961. A timely motion to reconsider was overruled on June 7, 1961. The petition for a writ of certiorari was filed on September 1, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether petitioner, a retired reserve officer with service prior to November 12, 1918, is entitled to have his retired pay computed in accordance with paragraph 4, Section 15, of the Pay Readjustment Act of June 16, 1942.

STATUTE INVOLVED

Paragraph 4 of Section 15 of the Pay Readjustment Act of June 16, 1942, 56 Stat. 359, (as amended, 37 U.S.C. 115), provides:

> *An Act to Readjust the Pay and Allowances of Personnel of the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service.*
>
> * * * *
>
> The retired pay of any officer of any of the services mentioned in the title of this Act who served in any capacity as a member of the military or naval forces of the United States prior to November 12, 1918, hereafter retired under any provision of law, shall, unless such officer is entitled to retired pay of a higher grade, be 75 per centum of his active duty pay at the time of his retirement.

STATEMENT

Petitioner was appointed second lieutenant, Field Artillery, Officers' Reserve Corps, on August 15, 1917. He served with the American Expeditionary Forces in France during World War I and was discharged on May 15, 1919. He accepted a commission as first lieutenant in the Officers' Reserve Corps on January 30, 1924, and served in the Reserves, attend-

ing meetings and summer camp from that date until he was recalled for extended active duty from May 5, 1941, to September 28, 1946. On July 31, 1953, pursuant to Title III of the Act of June 29, 1948, 62 Stat. 1081, 1087, as amended, petitioner was placed on the Army of the United States Retired List in the grade of colonel. Since his retirement he has been paid retired pay computed in accordance with the provisions of that Act. Pet. App. 1-2.

By this suit, petitioner, who had served in reserve components of the United States Army prior to November 12, 1918, seeks retired pay computed in accordance with Paragraph 4 of Section 15 of the Pay Readjustment Act of 1942, *supra*, rather than the lower pay that he has received under the provisions of Title III of the Army and Air Force Vitalization and Retirement Equalization Act of 1948, 62 Stat. 1081, 1087.[1] Pet. App. 2.

On cross-motions for summary judgment, the Court of Claims held that Paragraph 4 of Section 15 of the Pay Readjustment Act of 1942 applied only to regular components and not to reserve components of the Services enumerated in the title of the Act. Accordingly, the court granted the government's motion for summary judgment and dismissed the petition. Pet. App. 6, 7.

ARGUMENT

This Court has previously denied certiorari to review a Court of Claims decision presenting the iden-

[1] Approximately 1800 similar claims are being held in abeyance by the Court of Claims pending the final disposition of petitioner's claim.

tical issue raised by the present petition. *Reynolds* v. *United States*, 125 C. Cls. 108, certiorari denied, 346 U.S. 826. Adhering to its decisions in *Reynolds* as well as in *Berry* v. *United States*, 123 C. Cls. 530, the Court of Claims has once again held that a member of a reserve component of the military service is not entitled to the retired pay benefits prescribed by Paragraph 4 of Section 15 of the Pay Readjustment Act of 1942. Though there are numerous similar claims pending in the Court of Claims (*supra*, n. 1), the court's decision is clearly correct and further review by this Court is not warranted.[2]

The legislative history and background of the Pay Readjustment Act of 1942, and related acts, clearly demonstrate that Congress intended the Act to apply only to officers retired from the regular components of the enumerated services. The history and background of the 1942 Act were canvassed by the court below in *Berry* v. *United States*, 123 C. Cls. 530 and in *Reynolds* v. *United States*, 125 C. Cls. 108,[3] where the court held that officers retired from the Naval Reserve were not entitled to have their retirement

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[2] Since the *Berry* and *Reynolds* decisions, measures to amend Section 15 to include retired reserve officers have uniformly failed of passage. See S. 2448, 82nd Congress; S. 1330, 83rd Congress; S. 362, S. 1643, H.R. 6017, H.R. 6408, H.R. 11574, 84th Congress; S. 1085, S. 1622, S. 2083, H.R. 689, H.R. 4600, H.R. 9031, 85th Congress; S. 1209, S. 1655, H.R. 1136, H.R. 4296, H.R. 5272, 86th Congress.

[3] See 123 C. Cls. at 543-546; 125 C. Cls. at 112-114.

pay computed in accordance with the 1942 Act. Of course, the same result obtains as to petitioner who is retired from the reserve component of the Army.

To avoid these precedents and to avoid the impact of the history of the 1942 Act, petitioner asserts that it was improper for the court to look beyond the Act to ascertain Congressional intent and that the court was bound to give to the word "Army", appearing in the title of the Act, its literal and broadest meaning so as to encompass both the Army of the United States (denoting the reserve Army component) as well as the United States Army (denoting the regular component). We dispute that the meaning of the term "Army", in a statute of this type, is "popularly, administratively and legislatively" (Pet. 13) so clear and well understood as to foreclose inquiry beyond the bare language of the statute. But in any event, it is now too late to question that it is the function of the courts, in construing and applying statutes, "to construe the language so as to give effect to the intent of Congress." *United States* v. *American Trucking Associations*, 310 U.S. 534, 542. See also, *Boston Sand Co.* v. *United States*, 278 U.S. 41, 48; *Baltimore & Ohio R. Co.* v. *Jackson*, 353 U.S. 325, 333. The construction given the term "Army" by the Court of Claims in this case is in accord with Congressional intent (see *supra*, n. 4, p. 3) and petitioner is entitled only to the pay prescribed by the Act under which he is retired—The Army and Air Force Vitalization and Retirement Equalization Act of 1948, 62 Stat. 1081.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition should be denied.

ARCHIBALD COX,
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JOHN G. LAUGHLIN, JR.,
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SEPTEMBER 1961